Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSEPH JAMES STRATTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE APPLICATION OF THE *BOOKER* REMEDY OPINION HAS RESULTED IN A *DE FACTO* SIXTH AMENDMENT VIOLATION.

II. UNDER THE REASONING OF *APPRENDI, RING, BLAKELY* AND *BOOKER*, ANY FACT ESSENTIAL TO THE IMPOSITION OF SENTENCE MUST BE ESTABLISHED BY PROOF BEYOND A REASONABLE DOUBT.

III. USE OF THE 100:1 CRACK TO POWDER COCAINE RATIO IN DETERMINING THE GUIDELINE RANGE ON THE FACTS OF MR. STRATTON'S CASE RESULTED IN AN UNREASONABLE SENTENCE AND THE COURT ERRED IN CONCLUDING THAT UNDER *BOOKER* IT WAS NOT FREE TO DISREGARD THE GUIDELINE MANDATED DISPARITY.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **JOSEPH JAMES STRATTON**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Joseph James Stratton,* filed November 14, 2006. The decision of the Eleventh Circuit was unpublished, but a true and correct copy is included in Appendix A, *infra*.

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals (Appendix, *infra*) was unreported but can be found at 2006 WL 3298406.

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit on November 14, 2006, in *United States v. Joseph James Stratton*. The decision of the Eleventh Circuit was unpublished, but a true and correct copy is included in Appendix A, *infra*. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

> Amendment VI. Jury trials for crimes, and procedural rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED[1]

FIRST APPEAL

Mr. Stratton was convicted of conspiracy to distribute 500 grams or more of cocaine and five grams or more of cocaine base. The Presentence Report ("PSR") charged that Mr. Stratton was responsible for at least 1.5 kilograms of cocaine base, which would give Mr. Stratton a base offense level of 38. U.S.S.G. § 2D1.1(c)(1). Over Mr. Stratton's objection, the District Court accepted the PSR's drug quantity determination. After applying a two-level upward adjustment for obstruction of justice, the District Court determined that Mr. Stratton's adjusted offense level was 40. Since Mr. Stratton did not have a criminal history, his guideline range was 292-365 months. If the District Court had not made extra-verdict enhancements, Mr. Stratton's guideline range would have been 63-78 months. [*United States v. Thompson*, 422 F.3d 1285, 1301 (11th Cir. 2005)]. The district court sentenced Mr. Stratton to the low end of the range, 292 months.

Mr. Stratton appealed and the Circuit Court vacated his judgment and sentence and remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005), finding plain error under *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005).

RESENTENCING

At resentencing Mr. Stratton argued that despite the remedy provision of *Booker*, the district court was required

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[1] Bracketed references are to the record on appeal at the Eleventh Circuit Court of Appeals.

to sentence him within the guideline range determined without any extra verdict enhancements and solely on the basis of evidence beyond a reasonable doubt. [R328-6-7] Mr. Stratton also argued for a sentence reduction based on the disparity between crack cocaine and powder cocaine in the guidelines. [R328-11-12] Finally, Mr. Stratton made a number of arguments in favor of a "reasonable" sentence being less than the guideline range, including Mr. Stratton's age, lack of prior criminal record, and other similar factors. [R328-6] The district court rejected these arguments [R328-12-14], but did agree with Mr. Stratton's argument that he qualified for a safety valve reduction [R328-2-5], reducing his guideline range (based on judicially determined enhancements however), to 235-293 months. [R328-4] The district judge sentenced Mr. Stratton to the low end of that range, 235 months but did not depart from the guideline range despite the district judge's prior comments that the guideline range was excessive – the very comments which established *Booker* plain error and resulted in the resentencing. [*United States v. Thompson,* 422 F.3d 1285, 1301 (11th Cir. 2005)].

A three-judge panel of the Circuit Court denied Mr. Stratton relief on the second appeal on the issues presented in this petition in an unpublished decision, and his timely petition for rehearing *en banc* was also denied. Mr. Stratton remains incarcerated.

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

I. THE APPLICATION OF THE *BOOKER* REMEDY OPINION HAS RESULTED IN A *DE FACTO* SIXTH AMENDMENT VIOLATION.

The *Booker* remedy as applied by the federal courts has resulted in a *de facto* violation of the Sixth Amendment, because the lower federal courts have in practical effect continued to apply the Guidelines in a mandatory fashion. *Booker*'s remedy for the Sixth Amendment violation caused by judicial fact-finding of facts essential to the determination of the sentence, was to excise 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, and replace it with the instruction that the Guidelines, henceforth, would be advisory only.

However, as Justice Scalia predicted,[2] the result has been anything but advisory Guidelines. Instead what has developed in practical application are *de facto* mandatory Guidelines. *See* U.S. Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing (March 2006), found at http://www.ussc.gov/booker_report/Booker_Report.pdf.

When the practical application of a statute results in a constitutional violation, the court is required to fashion a remedy which prevents the constitutional harm. Whatever

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[2] "Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion?" *Booker*, 543 U.S. at 313.

the standard of scrutiny applicable to a Sixth Amendment violation, whether strict scrutiny (which we suggest is the appropriate standard), intermediate scrutiny or otherwise, the result of the *Booker* remedy provision has been to *de facto* incorporate mandatory Guidelines back into the sentencing process. The evidence from the Sentencing Commission is not subject to any other reasonable interpretation, and enough cases have been analyzed at this point (over 76,000 post-*Booker* sentencings were studied) to enable us to state with confidence that this has been the effect, intended or not. This has been no remedy – this has been a new wrong.

This Court is familiar with its equitable power to fashion a remedy for governmental action which results in *de facto* constitutional harms. The remedy is clear – until Congress acts to rewrite the sentencing statutes to provide a constitutionally permissible sentencing regime, Mr. Stratton, and others similarly situated, is entitled to resentencing utilizing procedures that *insure* that his Sixth Amendment rights will be safeguarded. *Booker* has notably failed to achieve that requirement.

A proper remedy is not difficult and is easily implemented. Mr. Stratton's case should be remanded with instructions that he be resentenced under the applicable Guidelines without, however, the application of any guideline enhancement that was not found by a jury beyond a reasonable doubt. This simple mechanism would insure the protection of Mr. Stratton's constitutionally guaranteed liberty as no other remedy has or could.

Cunningham, Rita* and *Claiborne

Rita v. United States, 127 S.Ct. 551 (2006) and *Claiborne v. United States*, 127 S.Ct. 551 (2006), currently pending before this Court likely will impact the decision in this petition. *Rita* presents the following three questions:

> 1. Was the district court's choice of within-Guidelines sentence reasonable?
>
> 2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?
>
> 3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

Claiborne presents the following two questions:

> 1. Was the district court's choice of below-Guidelines sentence reasonable?
>
> 2. In making that determination, is it consistent with *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

The intervening decision in *Cunningham v. California*, ___ S.Ct. ___, 2007 WL 135687, 75 USLW 4078 (2007), has made clear that this Court is prepared to revisit in some fashion its *Booker* jurisprudence in *Rita* and *Claiborne*:

> *Booker's remedy for the Federal Guidelines, in short, is not a recipe for rendering this Court's Sixth Amendment case law toothless. Further elaboration here on the federal reasonableness standard is neither necessary nor proper. The Court has granted review in two cases to be argued and decided later this Term raising questions trained on that matter. Claiborne v. United States,* ___ U.S. ___, 127 S.Ct. 551, ___ L.Ed.2d ___; *Rita v. United States,* ___ U.S. ___, 127 S.Ct. 551, 855, ___ L.Ed.2d ___. Pp. ___, 15-21.

Cunningham v. California, slip opinion, p. 3 (emphasis supplied).

Later in *Cunningham*, the Court stated:

> In an opinion written by Justice BREYER, also garnering a five-Member majority, the Court faced the remedial question, which turned on an assessment of legislative intent: What alteration would Congress have intended had it known that the Guidelines were vulnerable to a Sixth Amendment challenge? Three choices were apparent: the Court could invalidate in its entirety the Sentencing Reform Act of 1984 (SRA), the law comprehensively delineating the federal sentencing system; or it could preserve the SRA, and the mandatory Guidelines regime the SRA established, by attaching a jury-trial requirement to any fact increasing a defendant's base Guidelines range; finally, the Court could render the Guidelines advisory by severing two provisions of the SRA, 18 U.S.C. § 3553(b)(1) and 3742(e) (2000 ed. and Supp. IV). 543 U.S., at 246-249, 125 S.Ct. 738. [footnote omitted] Recognizing that "reasonable minds can, and do, differ" on the remedial question, the majority concluded that the advisory

Guidelines solution came closest to the congressional mark. *Id.*, at 248-258, 125 S.Ct. 738. . . .

Under the system described in Justice BREYER's opinion for the Court in *Booker,* judges would no longer be tied to the sentencing range indicated in the Guidelines. But they would be obliged to "take account of" that range along with the sentencing goals Congress enumerated in the SRA at 18 U.S.C. § 3553(a). 543 U.S., at 259, 264, 125 S.Ct. 738. [footnote omitted] Having severed § 3742(e), the provision of the SRA governing appellate review of sentences under the mandatory Guidelines scheme, see *supra,* at ___, 13, and n. 11, the Court installed, as consistent with the Act and the sound administration of justice, a "reasonableness" standard of review. 543 U.S., at 261, 125 S.Ct. 738. Without attempting an elaborate discussion of that standard, Justice BREYER's remedial opinion for the Court observed: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Ibid.*[FN13] *The Court emphasized the provisional character of the Booker remedy.* Recognizing that authority to speak "the last word" resides in Congress, the Court said:

FN13. *While this case does not call for elaboration of the reasonableness check on federal sentencing post-Booker, we note that the Court has granted review in two cases raising questions trained on that matter*: *Claiborne v. United States* and *Rita v. United States* [citations omitted]. In *Claiborne,* the Court will consider whether it is consistent with the advisory cast of the Guidelines system post-*Booker* to require

> that extraordinary circumstances attend a sentence varying substantially from the Guidelines. *Rita* includes the question whether is it consistent with *Booker* to accord a presumption of reasonableness to a within-Guidelines sentence.
>
> In this regard, we note Justice ALITO's view that California's DSL is essentially the same as post-*Booker* federal sentencing. *Post,* at ___, 1-10. To maintain that position, his dissent previews, without benefit of briefing or argument, how "reasonableness review," post-*Booker,* works. *Post,* at ___, 13-15. It is neither necessary nor proper now to join issue with Justice ALITO on this matter.

Cunningham v. California, slip opinion at p. 10 (emphasis supplied).

Finally, at footnote 15 of *Cunningham*, the following appears:

> FN15. Justice ALITO, however, would do just that. His opinion reads the remedial portion of the Court's opinion in *Booker* to override *Blakely,* and to render academic the entire first part of *Booker* itself. *Post,* at ___, 13-15. There would have been no majority in *Booker* for the revision of *Blakely* essayed in his dissent. Grounded in a notion of how federal reasonableness review operates in practice, Justice ALITO "necessarily anticipates" a question that will be aired later this Term in *Rita* and *Claiborne.* See *supra,* at ___, 14, n. 13. While we do not forecast the Court's responses in those cases, we affirm the continuing vitality of our prior decisions in point.

Justice Alito's *dissent*, referred to above, joined in by Mr. Justice Kennedy and Mr. Justice Breyer, included this opinion:

> The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for "reasonableness"; and both the California law explicitly, and the federal scheme implicitly require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict. Because this Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment, the same should be true with regard to the California system. I therefore respectfully dissent.

Cunningham v. California, slip opinion, p. 17.

Stratton's sentence was enhanced based upon guidelines factors determined by the judge alone based on a preponderance of the evidence, factors "neither inherent in the jury's verdict nor embraced by the defendant's plea." Furthermore, as Justice Alito stated in his *Cunningham dissent,* "The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*, 543 U.S. 220 (2005)." The majority decision in *Cunningham* states that "any fact that *exposes* a defendant to a greater

potential sentence must be found by jury, not a judge, and established beyond a reasonable doubt." [slip opinion, p. 8; emphasis supplied] The tension between the majority and dissent will inevitably require revision in the *Booker* remedy provision when *Rita* is decided, which will likely impact Stratton's sentencing, appeal and hence this petition.

Clearly Stratton cannot "forecast the Court's responses in those cases [*Rita* and *Claiborne*]," yet equally clearly their decision will impact for better or worse the determination whether his sentence was reasonable, or was not accorded the proper standard of review on appeal, or perhaps more fundamentally, will determine that his sentence and others like it was imposed in violation of the Fifth and Sixth Amendments whether reasonable or not. For this reason Stratton argues that his petition should be held pending the decision of *Rita* and *Claiborne* in light of the clear *prognosticum* of *Cunningham's* competing *dicta*.

II. UNDER THE REASONING OF *APPRENDI, RING, BLAKELY* AND *BOOKER*, ANY FACT ESSENTIAL TO THE IMPOSITION OF SENTENCE MUST BE ESTABLISHED BY PROOF BEYOND A REASONABLE DOUBT.[3]

Although the *Booker* remedial opinion holds that the advisory Guidelines system does not arouse Sixth Amendment concerns to the extent that a mandatory Guidelines system does, *see id.* at 750 (substantive majority opinion) (stating "when a trial judge exercises his

[3] This argument is adapted from *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019 (D. Neb. 2005).

discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"), this is not to say that there are no longer any constitutional constraints on sentencing under *Booker,* even as applied to the now-advisory Guidelines system. *See, e.g., McMillan v. Pennsylvania,* 477 U.S. 79, 87, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (due process will be violated when the finding of a sentencing factor becomes "a tail which wags the dog of the substantive offense"), *see also Booker,* 543 U.S. at ___ n. 6, 125 S.Ct. at 798 n. 6 (Thomas, J., dissenting in part) (stating that the Court's holding in *Booker* corrects the Sentencing Commission's mistaken belief, set out in U.S.S.G. § 6A1.3, p.s., that the preponderance of evidence standard is appropriate to meet due process requirements "[t]he Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by a jury or admitted by defendant.").

The Due Process Clause is implicated whenever a judge determines a fact by a standard lower than "beyond a reasonable doubt" if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact. *Id.* at 754-55; *Apprendi v. New Jersey,* 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Booker* does not alter these due process constraints on sentencing. *See Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 2539-40 (2004).

Thus, the contention that *Booker* signals a return to pre-Guidelines discretion is an overstatement. In contrast to the unfettered and unreviewable discretion to sentence a defendant at any point within a broad statutory range

that existed prior to the Guidelines, a sentencing court's discretion is now constrained by the notion of "reasonableness." *See Booker,* 125 S.Ct. at 765-66.

In order to comply with due process in determining a reasonable sentence, the sentencing court must require that a defendant be afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (noting the importance "in a free society that every individual going about his ordinary affairs have confidence that the Government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty"); *see also Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) ("The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires."); *Sullivan v. Louisiana,* 508 U.S. 275, 278, 282-83, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (stating that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt" and noting that an instructional error incorrectly describing the burden of proof will vitiate the jury's findings: "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt" is structural error not subject to harmless error review); *Estelle v. McGuire,* 502 U.S. 62, 72 n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense"); *Jackson v. Virginia,* 443 U.S. 307,

99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (finding the *Winship* doctrine, "establishing so fundamental a substantive constitutional standard, must also require that the fact-finder will rationally apply that standard to the facts in evidence"); *Patterson v. New York,* 432 U.S. 197, 215, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (recognizing a limit on state authority to reallocate traditional burdens of proof).

Although the limits of due process are defined with reference to the line that separates an element of a crime from a sentencing factor, *see, e.g., Blakely,* 124 S.Ct. at 2537 n. 5; *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348; *Harris v. United States,* 536 U.S. 545, 552-53, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002); *Jones v. United States,* 526 U.S. 227, 233, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), that line is blurred after *Booker. See Booker,* 125 S.Ct. at 755 (substantive majority opinion) (addressing sentencing factor/element distinction and identifying constitutional safeguards as formality of notice, identity of factfinder and the burden of proof).

Just as a court should construe a statute to avoid a constitutional infirmity if possible, *see Clark v. Suarez Martinez,* 543 U.S. 371, ___, 125 S.Ct. 716, 724, 160 L.Ed.2d 734 (2005), prudence dictates that this Court should require sentencing procedures that protect fundamental constitutional rights. Requiring that Fifth and Sixth Amendment procedural safeguards be afforded to enhancing facts will achieve this goal – the court should apply the same standard of proof to the factual showing that would be applied in reviewing the sufficiency of evidence to support the finding, or in conducting harmless error review on appeal, *e.g.*, whether a reasonable juror could have found the fact beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 318, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979); *Chapman v. State of Cal.*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See also Hankerson v. North Carolina,* 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977) (giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift the burden of proof to defendant); *Ivan v. City of New York,* 407 U.S. 203, 205, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972) (holding that the purpose of a reasonable doubt standard is "to overcome an aspect of a criminal trial that impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect"). Application of a lower standard of proof results in errors that significantly affect factfinding accuracy and undermines society's confidence in the result.

Whatever the ultimate constitutional limitations on the guidelines sentencing scheme are determined to be, it can never be "reasonable" to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt. *See Ring v. Arizona,* 536 U.S. 584, 592-93 n. 1, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding that any fact essential to imposition of the death penalty must be submitted to a jury and found beyond a reasonable doubt); *Apprendi,* 530 U.S. at 477, 120 S.Ct. 2348 (2000) (finding a sentence violates the right to "a jury determination that [the defendant] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); *Jones v. United States,* 526 U.S. at 243 n. 6, 119 S.Ct. 1215 (1999) (holding that the carjacking statute, if construed as defining a single crime with three maximum penalties instead of three distinct offenses would violate the Due Process Clause of the Fifth

Amendment and the notice and jury trial guarantees of the Sixth Amendment).

Mr. Stratton asks this Court to require that all facts that enhance a sentence be properly pled in an indictment or information, and either admitted, or submitted to a jury (or to the court if the right to a trial by jury is waived) for determination by proof beyond a reasonable doubt. The Government itself conceded in its brief in the first appeal: "If the Supreme Court does apply Blakely to the guidelines, it likely also will hold the guidelines unconstitutional as applied to defendants, like Thompson and Stratton, whose sentences were increased based on judge-made factfindings." Because that was not done in his case and Stratton objected to the application of a lower standard of proof, he is entitled to resentencing.

III. USE OF THE 100:1 CRACK TO POWDER COCAINE RATIO IN DETERMINING THE GUIDELINE RANGE ON THE FACTS OF MR. STRATTON'S CASE RESULTED IN AN UNREASONABLE SENTENCE AND THE COURT ERRED IN CONCLUDING THAT UNDER *BOOKER* IT WAS NOT FREE TO DISREGARD THE GUIDELINE MANDATED DISPARITY.

The District Court appeared to labor under the misconception that it did not have the discretion to consider the crack versus powder cocaine sentencing disparity in determining what a reasonable sentence would be. Not only did the district court have such authority, but to fail to consider such disparity in fashioning a sentence results in an unreasonable sentence in light of the history of the development of and response to the crack cocaine guidelines. The panel decision in this case denied Stratton relief

by the application of *United States v. Williams*, 456 F.3d 1353, 1364-67 (11th Cir. 2006), which held that federal courts are "not at liberty" to supplant what it called Congress's decision to establish the 100:1 crack to powder sentencing disparity.[4]

This holding of *Williams* is wrong in at least two respects, first that Congress did not establish the ratio, the Sentencing Commission did, and second, post-*Booker*, federal courts certainly are at liberty to disregard that determination; not only are they at liberty to do so, the failure to recognize that liberty – as was the case in Stratton's resentencing in which the district judge considered himself bound by the 100:1 ratio – results in a Sixth Amendment violation under *Booker*. Congress established drug quantities that trigger *minimum mandatory sentences*. Stratton is not disputing the application of a minimum mandatory sentence. Congress did not establish the guideline ratios, and the two matters are entirely different. Courts are as free to disregard this ratio under the *Booker* framework, as they are to disregard any guideline determination. It is only the minimum mandatory sentencing floor that must be adhered to.

We believe there is a split of authority on this point in the Circuit Courts. The Eighth Circuit, in *United States v. Cawthorn*, 429 F.3d 793, 802 (8th Cir. 2005), expressly upheld a district judge for recognizing his authority to disregard the 100:1 ratio pointing out that under *Booker* the guidelines are now advisory, not mandatory. The

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[4] This mistaken concept seems to have been borrowed from the Fourth Circuit's decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006). *See also United States v. Miller*, 450 F.3d 270 (7th Cir. 2006), *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006).

Second Circuit, in *United States v. Park*, 461 F.3d 245, 250 (2nd Cir. 2006), appears to follow this approach.[5]

We would ask this Court to grant certiorari to review this matter to determine whether the holdings in *Williams*, *Park* and now *Stratton*, are in fact inconsistent with *Booker's* requirement mandated by the Sixth Amendment that sentencing guideline determinations must be applied in an advisory manner only.

CONCLUSION

WHEREFORE, the Petitioner, JOSEPH JAMES STRATTON, respectfully requests this Honorable Court grant this petition for certiorari or hold this petition for review pending the decisions in *Rita* and *Claiborne*.

Respectfully submitted,

THE LAW OFFICE OF
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[5] However, in *Park*, the Court cited as apparent authority for its ruling, the Eleventh Circuit's decision in *United States v. Pope*, 461 F.3d 1331 (11th Cir. 2006).

[DO NOT PUBLISH]

205 Fed.Appx. 791

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-10080
Non-Argument Calendar

D. C. Docket No. 03-00024-CR-FTM-29DNF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH JAMES STRATTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(November 14, 2006)

Before DUBINA, CARNES and HULL, Circuit Judges.

PER CURIAM:

Joseph Stratton appeals his sentence for conspiracy to possess with intent to distribute crack and powder cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846. After review, we affirm.

I. BACKGROUND

A Drug Enforcement Administration Task Force investigation involving surveillance and a series of controlled buys revealed that Stratton and a co-defendant were dealing cocaine powder and crack cocaine out of an apartment in Naples, Florida. Following a jury trial, Stratton was convicted of conspiracy to possess with intent to distribute five grams or more of crack and 500 grams or more of powder cocaine. The presentence investigation report ("PSI") calculated a total offense level of 40 and a criminal history category of I, resulting in a guidelines range of 292 to 365 months' imprisonment. The district court imposed a 292-month sentence under a mandatory guidelines scheme, but expressed concerns about the length of Stratton's sentence given his status as a first-time offender. Stratton appealed his conviction and sentence. A prior panel of this Court affirmed Stratton's conviction, but vacated his sentence and remanded for resentencing in light of *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738 (2005). *See United States v. Thompson,* 422 F.3d 1285 (11th Cir. 2005).

On remand, the district court reconfirmed Stratton's guidelines calculations from his first sentencing. Stratton contended that he was eligible for safety-valve relief. The district court continued sentencing to give Stratton an opportunity to speak with law enforcement. When the sentencing hearing resumed, the government stated that Stratton qualified for a safety-valve reduction. The district court then reduced Stratton's base offense level by two levels, creating a guidelines range of 235 to 293 months.

Stratton also argued that, even under an advisory guidelines system, the district court was not permitted to

use extra-verdict facts to enhance a defendant's sentence. The district court overruled this objection as inconsistent with Eleventh Circuit precedent.

In mitigation, Stratton argued that he should receive a shorter sentence because he had been a model prisoner, had health concerns, was needed as the primary caregiver for his son and ailing mother and because of the sentencing disparity between crack and cocaine powder.

The district court noted the factors in 18 U.S.C. § 3553(a) and acknowledged Stratton's arguments in mitigation. In particular, the district court noted Stratton's lack of a prior criminal history, his good behavior in prison and his family situation. However, the district court also concluded that Stratton's mother's health and his son's living situation were not extraordinary. The district court also rejected the crack and cocaine powder sentencing disparity as a basis for a sentence reduction. The district court emphasized the nature of Stratton's offense and his role in the conspiracy and imposed a 235-month sentence.

Stratton objected to the sentence imposed, arguing that his co-defendant's sentence had been reduced by one-third at resentencing. The district court overruled this objection, noting that, on remand, Stratton's co-defendant still received a 240-month sentence, five months more than Stratton, in large part because of her extensive criminal history and drug problem. Stratton's sentence, on the other hand, was attributable to his greater role in the conspiracy than his co-defendant.

Stratton filed this appeal.

II. DISCUSSION

On appeal, Stratton raises various challenges to his sentence, none of which have merit.[1] First, Stratton argues that the Supreme Court's opinion in *Booker* is unconstitutional. However, this Court is bound to follow the law of the Supreme Court and cannot overturn *Booker*. *See United States v. Gibson*, 434 F.3d 1234, 1246-47 (11th Cir.), *cert. denied*, 126 S. Ct. 2911 (2006).

Second, Stratton's argument that the district court violated *Booker* by enhancing his sentence based on extra-verdict facts misunderstands *Booker*'s remedial holding. Under an advisory guidelines scheme, a judge may enhance a defendant's sentence based upon facts found by the judge at sentencing using the preponderance of the evidence standard. *See United States v. Chau*, 426 F.3d 1318, 1323-24 (11th Cir. 2005).

Third, it is well-settled that the application of *Booker's* remedial holding does not implicate *ex post facto* or due process concerns where the defendant was aware of the statutory maximum sentence applicable to his offense. *See United States v. Duncan*, 400 F.3d 1297, 1303-04 (11th Cir.), *cert. denied*, 126 S. Ct. 432 (2005).

Fourth, this Court already has rejected the argument that the disparity between crack and powder cocaine sentences should be a factor in determining a reasonable

---

[1] Stratton also attempts to challenge 21 U.S.C. § 846 as facially unconstitutional under the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). We are barred by the law-of-the-case doctrine from addressing this issue because Stratton could have, but did not, raise it in his first appeal. *See United States v. Fiallo-Jacome*, 874 F.2d 1479, 1481-83 (11th Cir. 1989).

sentence. *United States v. Williams*, 456 F.3d 1353, 1364-67 (11th Cir. 2006). The 100:1 ratio between crack and power cocaine "reflect[] Congress's policy decision that crack offenders should be punished more severely," and "[f]ederal courts are not at liberty to supplant [that] policy decision." *Id.* at 1367.

Finally, we reject Stratton's argument that the district court plainly erred by failing to *sua sponte* recuse himself after remand. Nothing in the record, including Judge Tjoflat's concurrence to this Court's prior opinion, demonstrates that the district court judge held a personal bias or prejudice concerning a party or that the district court judge's impartiality might reasonably be questioned. *See* 28 U.S.C. § 455(a)-(b); *see also United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003); *United States v. Bailey*, 175 F.3d 966, 968-69 (11th Cir. 1999).

For all these reasons, we affirm Stratton's 235-month sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

UNITED STATES OF AMERICA	**Case Number: 2:03-CR-24-FTM-29DNF**
–vs–	**USM Number: 33624-018**
JOSEPH JAMES STRATTON	George F. Murphy, Esq., Retained P.O. Box 188 Valparaiso, FL 32580

JUDGMENT IN A CRIMINAL CASE UPON REMAND

(Filed Dec. 19, 2005)

The defendant was found guilty on Count One of the Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846, 841(b)(1)(B)	Conspiracy to possess with intent to distribute 500 grams or more of cocaine and 5 grams or more of cocaine base, crack cocaine	February 25, 2003	One

The defendant is re-sentenced following remand from the Eleventh Circuit as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of

1984, as modified by *United States v. Booker*, 125 S. Ct. 738 (2005).

The Original and First Superceding Indictments are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
April 26, 2004

Date of Re-Sentence:
December 16, 2005

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES
DISTRICT JUDGE

December 19, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **235 months**.

The Court recommends to the Bureau of Prisons:

Incarceration as close to home (Naples, Florida) as possible, that being the facility in Miami, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Four (4) years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one

drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall provide the Probation Officer access to any requested financial information.

2. Having been convicted of a qualifying felony offense, the defendant shall cooperate with the probation office in the collection of DNA, if not collected by the Bureau of Prisons.

3. The defendant shall refrain from any unlawful use of a controlled substance, and shall submit to one drug test within 15 days of placement on supervised release and at least two periodic drug tests thereafter as directed by the probation officer. Based on the Court's determination that additional drug urinalysis is necessary, the Court authorizes random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100	Waived	N/A

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be

subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

It is further ordered that you shall forfeit to the United States those assets previously identified in the Special Forfeiture Verdict, that being the property located at **4461 Pine Ridge Road, Naples, Florida**.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine

interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed
On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

Ineligible for all federal benefits for a period of **Five (5) Years.**

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk is responsible for sending a copy of this page and the first page of this judgment to:

Denial Federal Benefits Program
U.S. Department of Justice
Office for Justice Assistance
810 7th Street, N.W.
Washington, DC 20531

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

UNITED STATES OF AMERICA	**Case Number: 2:03-CR-24-FTM-29DNF**
–vs–	**USM Number: 33624-018**
JOSEPH JAMES STRATTON	Charles A. Murray, Retained 1300 Third Street South, Suite 302B Naples, FL 34102

JUDGMENT IN A CRIMINAL CASE

(Filed Apr. 28, 2004)

The defendant was found guilty on Count One of the Second Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846, 841(b)(1)(B)	Conspiracy to possess with intent to distribute 500 grams or more of cocaine and 5 grams or more of cocaine base, crack cocaine	February 25, 2003	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments

imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

April 26, 2004

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES
DISTRICT JUDGE

April 28, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **292 months.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall provide the Probation Officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	Waived	NA

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Special assessment of $100.00 due immediately

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

It is further ordered that the defendant shall forfeit to the United States those assets previously identified in the Special Forfeiture Verdict, that are subject to forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed
On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be

Ineligible for all federal benefits for a period of **5 Years.**

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice Office of
Justice Programs, Washington, DC 20531

Notice sent to: All parties &

____ Jesus M. Casas, Esq.
U.S. Attorney's Office
Middle District of Florida
U.S. Courthouse
2110 First St., Room 3-137
Ft. Myers, FL 33901

2:03-cr-00024 sll

____ Joseph James Stratton
4461 Pine Ridge Rd.
Naples, FL 34119

2:03-cr-00024 sll

____ Charles Alex Murray, Esq.
Law Office of Charles A. Murray
1300 Third St. S., Suite 302-B
Naples, FL 33940

2:03-cr-00024 sll

U.S. Dept. of Justice

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-10080-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH JAMES STRATTON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Jan. 3, 2007)

BEFORE: DUBINA, CARNES and HULL, Circuit Judges.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

FILED
JUN 1 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

3

No. 06-1311

In the Supreme Court of the United States

JOSEPH JAMES STRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOHN-ALEX ROMANO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the district court treated the federal Sentencing Guidelines as effectively mandatory when it resentenced petitioner.

2. Whether the district court violated petitioner's due process rights by finding facts that increased his advisory Guidelines range using the preponderance-of-the-evidence standard.

3. Whether a district court has the authority to impose a sentence below the advisory Guidelines range in order to counteract the Guidelines' more severe treatment of crack cocaine as compared to powder cocaine offenses.

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In the Supreme Court of the United States

No. 06-1311

JOSEPH JAMES STRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) on appeal from petitioner's resentencing is not published in the Federal Reporter but is available at 205 Fed. Appx. 791. The opinion of the court of appeals on appeal from petitioner's initial sentencing is reported at 422 F.3d 1285.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2006. A petition for rehearing was denied on January 3, 2007 (Pet. App. 22-23). The petition for a writ of certiorari was filed on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to possess cocaine and cocaine base (crack) with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1), 841(b)(1), and 846. He was initially sentenced to 292 months of imprisonment, to be followed by four years of supervised release. The court of appeals affirmed his conviction but vacated his sentence and remanded his case for resentencing under *United States* v. *Booker*, 543 U.S. 220 (2005). Petitioner was resentenced to 235 months of imprisonment, to be followed by four years of supervised release. The court of appeals affirmed his sentence. Pet. App. 1-5; Gov't C.A. Br. 2.

1. An investigation by a Drug Enforcement Administration Task Force revealed that petitioner and Elizabeth Thompson were dealing powder and crack cocaine in Naples, Florida. Between 1996 and 2003, petitioner supplied Thompson and other mid-level cocaine dealers with more than ten kilograms of high-quality powder cocaine, most of which was processed into crack and resold. In March 2003, petitioner and Thompson were arrested. Pet. App. 2; Gov't C.A. Br. 2-3; *United States* v. *Thompson*, 422 F.3d 1285, 1289-1291 (11th Cir. 2005).

2. On July 23, 2003, a grand jury sitting in the Middle District of Florida returned a second superseding indictment that charged petitioner and Thompson with conspiring to distribute 500 grams or more of cocaine and 5 grams or more of crack cocaine and to possess those drugs in those quantities with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1), 841(b)(1), and 846. The indictment also charged Thompson with two counts of distributing crack and possessing it with

the intent to distribute it. A petit jury subsequently found petitioner and Thompson guilty on all counts. Second Superseding Indictment 1-2; *Thompson*, 422 F.3d at 1289.

3. Petitioner was sentenced before this Court's decision in *Booker*. The district court found that petitioner was responsible for at least 1.5 kilograms of crack, 4/26/04 Tr. 69-70, which resulted in a base offense level of 38, see Sentencing Guidelines § 2D1.1(c)(1) (Guidelines) (drug quantity table).[1] The court imposed a two-level enhancement for obstruction of justice based on its finding that petitioner had committed perjury at trial. See 4/26/04 Tr. 65-68; Guidelines § 3C1.1. Accordingly, petitioner's total offense level was 40, which, together with his criminal history category of I, yielded a Sentencing Guidelines range of 292 to 365 months of imprisonment. See 4/26/04 Tr. 70. Before imposing sentence, the court expressed concern about the length of the sentence that petitioner faced but concluded that the sentence was required by the Guidelines, which were mandatory at that time. See *id.* at 74. The court sentenced petitioner to 292 months of imprisonment, to be followed by four years of supervised release. *Id.* at 74-75.

4. Petitioner appealed his conviction and sentence. While that appeal was pending, this Court decided *Booker*, which held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory federal Sentencing Guidelines. See 543 U.S. at 244.

---

[1] The court's finding that petitioner was responsible for at least 1.5 kilograms of crack was based on a dealer's trial testimony that he purchased approximately seven kilograms of cocaine from petitioner, which he converted into approximately three and a half kilograms of crack. 4/26/04 Tr. 45-46.

As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* *Booker*, 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-246 (citations omitted). The Court also severed the appellate review standards in 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonable[ness]," under which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261. In light of *Booker*, the court of appeals vacated petitioner's sentence and remanded for resentencing. *Thompson*, 422 F.3d at 1300-1302.

5. On November 28, 2005, the district court conducted a resentencing hearing. Petitioner argued that he faced a revised Guidelines range of 63 to 78 months of imprisonment because, in his view, *Booker* established that he could be held responsible only for the minimum quantity of drugs reflected by the jury's verdict—500 grams of cocaine and 5 grams of crack. 11/28/05 Tr. 6-7. The district court rejected that argument, stating "[t]hat's not what Booker held. Booker * * * held that the remedy for the mandatory guidelines was to make the guidelines range not mandatory." *Id.* at 7. The court stated that petitioner's Guidelines "range [wa]s still 292 to 365 months, the difference being the Court is not compelled by law, anymore, to impose a sentence

within that range." *Ibid.*; see *id.* at 9-10 ("[W]e're here on a Booker decision for the Court to recognize its authority to go below the 292 months, but not below 60 months, of course, since that's a mandatory minimum.").

Petitioner also contended that he was eligible for a reduction of his offense level under the safety valve provision, see Guidelines §§ 2D1.1(b)(9), 5C1.2. 11/28/05 Tr. 13. The court asked defense counsel how, in light of petitioner's continued denial of guilt, petitioner satisfied the fifth criterion for safety valve treatment, which requires that "not later than the time of the sentencing hearing, the defendant [must have] truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," Guidelines § 5C1.2(a)(5). Counsel responded that he had "attempted to reach" the government in connection with that disclosure, and he proffered that petitioner would provide the government with information that "may pertain to the offense for which he is there, and therefore, if that is true, then the safety valve would apply." 11/28/05 Tr. 17-18, 32. Based on that proffer, the court continued the hearing to give petitioner additional time to satisfy the safety valve requirements. *Id.* at 33-34.

On December 16, 2005, the district court reconvened the resentencing hearing. The government advised the court that petitioner had met with the government and that, in its opinion, petitioner was now eligible for a safety valve reduction. 12/16/05 Tr. 2. The court agreed and reduced petitioner's offense level from 40 to 38, which resulted in an advisory Guidelines range of 235 to 293 months of imprisonment. *Id.* at 3-5. Petitioner's counsel reiterated his argument that the court could not

enhance petitioner's sentence based on extra-verdict facts, but counsel acknowledged that his view "is not the law in the federal courts." *Id.* at 7.

Petitioner's counsel also requested that the court impose a below-Guidelines sentence because of petitioner's "age, his health, his 85-year-old mother and nine-year-old son," and because of the "disparity" between the treatment of crack and powder cocaine under the Guidelines. 12/16/05 Tr. 5-6, 11.[2] Before imposing sentence, the court informed petitioner:

> Your biggest problem is the nature of your conviction, and the drugs involved, and your role in that offense. Not as role is defined by the guidelines, but . . . what you did with regard to the offense and the co-defendant.
>
> In your favor, you have no prior criminal record, of any sort, to speak of. Your family situation, I think those are factors the Court can and will consider, but your mother's health and your son's situation, your medical situation, are not extraordinary. Many people who I see have similar or worse family situations.

Id. at 10. In response to counsel's argument about the powder-crack differential, the court stated:

> Well, I don't frankly see that as being a basis for a reduction in sentence in this case, in particular. The defendant was convicted of both powder cocaine and crack cocaine, and the . . . the statutory dis-

---

[2] Under the Guidelines, the offense level (but not the sentencing range) applicable to a particular quantity of crack cocaine is equal to the offense level applicable to a quantity of powder cocaine that is one hundred times as great. See Guidelines § 2D1.1(c) (drug quantity table).

> tinction between powder cocaine and crack cocaine has always been in effect during the commission of this offense. You know, he commits the offense as he does, and I don't see the fact that there's a difference between the penalties for powder and crack as being a mitigating factor.

Id. at 12. The court then sentenced petitioner to 235 months of imprisonment, to be followed by four years of supervised release. *Id.* at 14.

6. Petitioner appealed his sentence. As relevant here, petitioner raised three arguments. First, he argued that *Booker*'s remedial opinion, as it has been applied, violates the Sixth Amendment, because it has resulted in the de facto mandatory application of the Guidelines. Second, he argued that due process requires that any fact used to increase substantially a defendant's sentence be proved beyond a reasonable doubt. Third, he argued that the district court appeared to have erroneously concluded that it lacked discretion to take into account the differential treatment of crack and powder cocaine under the Guidelines. Pet. C.A. Br. 9-11.

The court of appeals affirmed petitioner's sentence. Pet. App. 1-5. The court held that it was bound to follow *Booker* and that, "[u]nder an advisory Guidelines scheme, a judge may enhance a defendant's sentence based upon facts found by the judge at sentencing using the preponderance of the evidence standard." *Id.* at 4. In addition, citing *United States* v. *Williams*, 456 F.3d 1353, 1364-1367 (11th Cir. 2006), cert. dismissed, No. 06-7352 (June 28, 2007), the court stated that it "already ha[d] rejected the argument that the disparity between crack and powder cocaine sentences should be a factor in determining a reasonable sentence." Pet. App. 4-5.

DISCUSSION

Petitioner raises three issues. Although the first two issues do not warrant this Court's review, the Court recently granted review in *Kimbrough* v. *United States*, No. 06-6330, to address the third issue—whether a district court has authority to sentence below the advisory Sentencing Guidelines range to counteract the Guidelines' more severe treatment of crack cocaine as compared to powder cocaine offenses. Accordingly, the petition for a writ of certiorari in this case should be denied with respect to the first two issues, and, with respect to the third issue, should be held pending the Court's decision in *Kimbrough* and then disposed of as appropriate in light that decision.

1. Petitioner first renews his contention (Pet. 5-6) that the remedial opinion in *United States* v. *Booker*, 543 U.S. 220 (2005), has resulted in a de facto Sixth Amendment violation because, in practice, the lower federal courts continue to apply the Guidelines in a mandatory fashion. That contention does not warrant this Court's review because it is not true as a general matter, and because, in any event, the district court did not treat the Guidelines as mandatory in petitioner's case.

It is universally recognized after *Booker* that the Guidelines are advisory, and district courts have discretion to impose non-Guidelines sentences under the factors identified in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). If any further confirmation of that legal principle were needed, this Court provided it in *Rita* v. *United States*, No. 06-5754, 2007 WL 1772146 (June 21, 2007). *Rita* makes clear that, where the sentencing judge and the Commission's range agree, a court of appeals may apply a presumption that the sentence is reasonable.

Id. at *6. *Rita* necessarily recognizes that there is no flaw, constitutional or otherwise, in a district court's reasoned application of independent judgment, based on the facts it has found, to sentence within the Guidelines range. It follows that the statistics to which petitioner alludes (Pet. 5) concerning the prevalence of within-Guidelines sentences provide no cause for constitutional concern.

In any event, when resentencing petitioner, the district court repeatedly stated that the Guidelines are advisory and that it could impose a sentence below the applicable Guidelines range. See, *e.g.*, 11/28/05 Tr. 9-11, 26, 28, 34; 12/16/05 Tr. 5, 10. The court recognized, consistent with *Booker*, that "while [it] is required to consider the guidelines, it is also required to consider the other statutory factors [in 18 U.S.C. 3553(a)]." 12/16/05 Tr. 5; accord *id.* at 10. And the court did precisely that. After adjusting petitioner's Guidelines range downward based on the safety valve provision, the court assessed the nature of petitioner's offense, his record and rehabilitative efforts in prison, and the personal and family circumstances that he cited in mitigation. *Id.* at 10-12. The court's decision to impose a Guidelines sentence, albeit at the bottom of the applicable range, reflected its determination that petitioner had played a major part in a serious drug conspiracy. *Id.* at 10 ("Your biggest problem is the nature of your conviction, and the drugs involved, and your role in that offense."); *id.* at 13-14 ("I still come back to the . . . the nature of the case, and the facts that the jury found, and that the Court has found."). The court also determined that the 235-month sentence was "sufficient, but not greater than necessary to comply with the purposes of sentencing set forth in [18 U.S.C.] 3553." *Id.* at 15. Because the district court

clearly did not treat the Guidelines as mandatory, further review of petitioner's claim that the *Booker* remedy has resulted in de facto mandatory Guidelines is not warranted.

2. Petitioner also contends (Pet. 12-17) that the Due Process Clause requires proof beyond a reasonable doubt of facts that increase a defendant's advisory Guidelines range. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review of petitioner's contention is not warranted.

a. This Court has made clear that a court may, consistent with the Constitution, select a sentence from within a statutory range based on facts found by the court by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 156-157 (1997) (per curiam) (holding that a sentencing court may base its sentence on conduct of which the defendant was acquitted "so long as that conduct has been proved by a preponderance of the evidence," and that "application of the preponderance standard at sentencing generally satisfies due process") (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986)); see also *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (ruling that a sentencing judge was authorized to determine that the offense involved crack even if the jury had convicted the defendants of a conspiracy involving only cocaine); *Witte* v. *United States*, 515 U.S. 389, 400-401 (1995) (noting that this Court's cases "authoriz[e] the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial" because "such consideration does not result in 'punishment' for such conduct").

Booker did not disturb that settled precedent. In accordance with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), *Booker* held that any fact, other than a prior conviction, necessary to support a sentence exceeding "the maximum authorized" by a guilty plea or jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. 543 U.S. at 244. By severing provisions of the SRA to make the Guidelines advisory, rather than mandatory, however, *Booker* remedied the constitutional problem presented by the Guidelines: now, the "maximum [sentence] authorized" by the jury verdict in federal criminal cases is the statutory maximum for the offense under the United States Code.[3] Thus, so long as the sentencing judge imposes a sentence within the statutory range, sentencing based on judge-found facts by a preponderance of the evidence is constitutionally permissible. See *id.* at 233 (noting that, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"); *id.* at 240-241 (reviewing *Edwards*, *Watts*, and *Witte* and concluding that "[n]one of our prior cases is inconsistent with today's decision").

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[3] Petitioner cites (Pet. 13) Justice Thomas's statement, in his opinion dissenting in part in *Booker*, that "[t]he Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of the facts of facts found by the jury or admitted by the defendant." 543 U.S. at 319 n.6 (Thomas, J., dissenting in part). Because the Guidelines are now advisory, however, fact-finding under the Guidelines does not increase a defendant's sentence "beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant."

The Court recently recognized that "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita*, 2007 WL 1772146, at *9; see *id.* at *10 (noting *Booker*'s recognition that fact-finding by federal judges in the application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding"). Similarly, the due process principles invoked by petitioner do not prohibit a sentencing court from relying on facts that it has found by a preponderance of the evidence to increase a defendant's sentence within the applicable statutory range.

b. Petitioner erroneously contends (Pet. 11-12) that this Court's decision in *Cunningham* v. *California*, 127 S. Ct. 856 (2007), calls that conclusion into doubt. In *Cunningham*, the Court held that California's Determinate Sentencing Law violates the Sixth and Fourteenth Amendments. *Id.* at 871. Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower term, a middle term, and an upper term. *Id.* at 861. California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." *Ibid.* (quoting Cal. Penal Code § 1170(b) (West Supp. 2006)). A rule issued under that law provides that "[t]he middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." *Id.* at 862 (brackets in original) (quoting Cal. Ct. R. 4.420(a) (West 2006)). Aggravating and mitigating circumstances are defined as "facts" and may be established by a prepon-

derance of the evidence. *Id.* at 862-863. In determining those "facts," the court may consider "the trial record; the probation officer's report; statements in aggravation or mitigation submitted by the parties, the victim, or the victim's family; 'and any further evidence introduced at the sentencing hearing.'" *Id.* at 862 (quoting Cal. Penal Code § 1170(b) (West Supp. 2006)).

This Court concluded that the middle term, not the upper term, specified in California's statutes is the relevant statutory maximum for *Apprendi* purposes. *Cunningham*, 127 S. Ct. at 871. Because California's Determinate Sentencing Law "authorizes the judge, not the jury, to find facts permitting an upper term sentence," the Court held that it violates the Sixth Amendment. *Ibid.* In doing so, the Court stated that California's system "does not resemble the advisory system the *Booker* Court had in view" because "judges are not free to exercise their 'discretion to select a specific sentence within a defined range.'" *Id.* at 870 (quoting *Booker*, 543 U.S. at 233). The Court reiterated that the SRA, as modified by *Booker*, does not violate the Sixth Amendment. See *ibid.* (stating that "'[m]erely advisory provisions,' recommending but not requiring 'the selection of particular sentences in response to differing sets of facts,' all Members of the Court agreed, 'would not implicate the Sixth Amendment.'" *Ibid.* (quoting *Booker*, 543 U.S. at 233). Petitioner's reliance on *Cunningham* is therefore mistaken.

c. Since *Booker*, the courts of appeals have consistently held that a sentencing judge may generally find facts relevant to determination of the advisory Guidelines range by a preponderance of the evidence. See *United States* v. *Grier*, 475 F.3d 556, 565 (3d Cir. 2007) (en banc), petition for cert. pending, No. 06-11486 (filed

May 22, 2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Yeje-Cabrera*, 430 F.3d 1, 23 (1st Cir. 2005); *United States* v. *Morris*, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 127 S. Ct. 121 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Pirani*, 406 F.3d 543, 551 n.4 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005); *United States* v. *Yagar*, 404 F.3d 967, 972 (6th Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).[4]

In the absence of a conflict in the circuits, the court of appeals' conclusion that the preponderance standard applies to facts that increase a defendant's advisory Guidelines range does not warrant this Court's review. The Court recently denied a petition for a writ of certiorari raising the same issue in *Welch* v. *United States*,

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[4] Both before and after *Booker*, the Ninth Circuit has taken the position that facts that "ha[ve] an 'extremely disproportionate effect on the sentence relative to the offense of conviction'" must be proved by "clear and convincing evidence." *United States* v. *Staten*, 466 F.3d 708, 717-720 (2006) (brackets in original) (quoting *United States* v. *Peyton*, 353 F.3d 1080, 1088 (9th Cir. 2003) and *United States* v. *Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000)). Because petitioner did not advocate that position in the courts below and does not press that position even in this Court, this case is not an appropriate vehicle for the Court to decide whether the Ninth Circuit's position is correct. Moreover, petitioner has not contended that the outcome of his sentencing would have been any different under the Ninth Circuit's rule, and there is no reason to believe that it would have been.

127 S. Ct. 552 (2006), and there is no reason for a different result here.

3. Petitioner further contends (Pet. 17-19) that, pursuant to *Booker*, a federal district court has the authority to impose a sentence below the advisory Guidelines range in order to counteract the Guidelines' more severe treatment of crack cocaine as compared to powder cocaine offenses. On June 11, 2007, this Court granted a writ of certiorari in *Kimbrough* v. *United States*, No. 06-6330, to address that question. It is not at all clear that the district court in this case believed that it lacked authority to reduce petitioner's sentence because of the crack/powder differential under the Guidelines. Rather, it appears that the court found no basis in the facts of this case to reduce petitioner's sentence for that reason. See pp. 6-7, *supra*. Nonetheless, in affirming petitioner's sentence, the court of appeals relied on its precedent that the Guidelines' differential treatment of crack and powder cocaine offenses is not a proper sentencing factor. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution of *Kimbrough*, and then disposed of as appropriate in light of the decision in that case.

CONCLUSION

With respect to the first two questions presented, the petition for a writ of certiorari should be denied. With respect to the third question presented, the petition should be held pending the Court's decision in *Kimbrough* v. *United States*, No. 06-6330, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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No. 06-1311

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In The

Supreme Court of the United States

JOSEPH JAMES STRATTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

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REASONS FOR GRANTING THE PETITION

In its brief in opposition, the government argues that Stratton's grounds one and two (challenging *Booker*'s remedial decision as applied and challenging the standard of proof required in *Booker* sentencing fact finding) be denied, but that as to ground three (crack versus powder disparity) the petition be held for disposition in accordance with the disposition of *Kimbrough v. United States*, No. 06-6330.

We respectfully disagree as to grounds one and two. In light of *Rita v. United States*, 127 S.Ct. 2456 (2007), which was cited by the Government's brief in opposition, but which issued after Stratton's petition was filed, the arguments for granting certiorari on grounds one and two are all the more compelling.

The concerns presented by Justice Scalia's special concurrence, joined by Justice Thomas, as well as Justice Souter, and acknowledged by Justices Stevens and Ginsburg in *Rita* regarding the hypothetical case presented by Justice Scalia are presented in fact by Stratton's case. Justice Stevens wrote that "Such a hypothetical case should be decided if and when it arises." *Rita*, 127 S.Ct. 2456, 2473 (2007).

As Justice Scalia wrote: "The Court has reintroduced [in the *Rita* appellate review presumption of reasonableness of guideline sentences] the constitutional defect that *Booker* purported to eliminate." *Rita*, 127 S.Ct. 2456, 2476 (2007). Justice Scalia later elaborated: "The only difference between this system [the *Rita* appellate review standard] and the pre-*Booker*

mandatory Guidelines is that the maximum sentence based on the jury verdict or guilty plea was specified under the latter but must be established by appellate courts, in case by case fashion, under the former. *This is, if anything, an additional constitutional disease, not a constitutional cure.*" *Rita*, 127 S.Ct. 2456, 2477 (2007) (emphasis supplied).

Pertinent to Stratton's argument in ground one of his petition, Justice Scalia wrote:

> Yet they [the majority] now adopt substantive reasonableness review without offering any rebuttal to my charge of patent constitutional flaw inherent in such review. *The one comfort to be found in the Court's opinion – though it does not excuse the failure to apply* Martinez's *interpretive principle – is that it does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea.*

Rita, 127 S.Ct. 2456, 2479 (2007).

Stratton's argument all along has been that his case presents a *de facto*, or as applied, Sixth Amendment violation. The *de facto* violation of the Sixth Amendment first occurred at Stratton's resentencing when the district court reneged on its own admission at the first, *pre-Booker*[1] sentencing that the guideline

[1] *United States v. Booker*, 534 U.S. 220 (2005).

sentence was too severe, but when given an opportunity on remand under *Booker* to reduce the sentence, continued to slavishly apply the too severe guideline, despite lip service to the bromide of *Booker*'s remedial opinion that the guidelines were now advisory.[2] The Government in its brief in opposition blithely dismisses the statistical data that shows that this case is no fluke, instead it is typical and represents a pattern of *post-Booker* Constitutional violation, that were it presented in any other context would be sufficiently clear to warrant relief.

As Justice Scalia wrote in footnote 4 of his special concurrence:

> [T]he Court is wrong to think that the constitutional problem today's opinion ignores is hypothetical, merely because I have used hypotheticals to describe it. It is all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts – as *Booker* itself recognized, see 543 U.S. at 236-237, 125 S.Ct. 738 (citing *inter alia*, a case in which a defendant's sentence increased from 57 months to 155 years).

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[2] The Court did apply a two level safety valve reduction that had not applied at the first sentencing, but this barely mitigated the excessive severity of the guideline range, a range magically determined by a conversion of powder cocaine quantities to crack cocaine offense levels. It was an *Alice in Wonderland* approach.

Mr. Stratton was convicted of conspiracy to distribute 500 grams or more of cocaine and five grams or more of cocaine base. The Presentence Report ("PSR") charged that Mr. Stratton was responsible for at least 1.5 kilograms of cocaine base, which would give Mr. Stratton a base offense level of 38. U.S.S.G § 2D1.1(c)(1). Over Mr. Stratton's objection both to the quantity of powder cocaine and to the finding that he was accountable for down-stream conversion of the powder cocaine to crack cocaine, the District Court accepted the PSR's drug quantity determination. After applying a two-level upward adjustment for obstruction of justice, the District Court determined that Mr. Stratton's adjusted offense level was 40. Since Mr. Stratton did not have a criminal history, his guideline range was 292-365 months. *If the District Court had not engaged in extra-verdict fact finding to support Guideline enhancements, Mr. Stratton's guideline range would have been 63-78 months.*

At resentencing after the *Booker* remand,[3] the district court made the very same determinations

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[3] In Stratton's first appeal the Eleventh Circuit granted Stratton a *Booker* remand finding that the district court had committed plain error in violating Mr. Stratton's Sixth Amendment rights by making these sentencing determinations:

> Because the District Court enhanced Ms. Thompson's sentence under a mandatory guideline system on the basis of factual findings not made by a jury or admitted by Ms. Thompson, Ms. Thompson's Sixth Amendment rights were violated. *Rodriguez*, 398 F.3d at

(Continued on following page)

with the only difference being that the district court granted Stratton a safety valve two level downward adjustment, reducing the offense level to 38 and the sentencing range to 235-293 months and imposed a 235 month sentence. Without the extra-verdict enhancements after the safety valve reduction his sentencing range would have been 51-63 months. The sentence supported by the jury verdict – fifty-one months – was increased by judicial fact finding to almost 20 years in prison.

Now under *Rita* this determination has been cemented into place by a standard of review that compounds the constitutional error. The same factors that created the constitutional error – judicial fact finding which has multiplied a punishment almost five-fold – are now used under *Rita* to uphold the reasonableness of that same sentence. This is circular reasoning, and as Justice Scalia noted, it compounds instead of cures, the constitutional violation.

The concurring Justices in *Rita* were at pains to emphasize that *Booker*'s remedial opinion is settled precedent. Stratton does not agree that surviving one term settles precedent. Instead, the tsunami of post-*Booker* appellate litigation and the statistics gathered by the Sentencing Commission showing that the

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1298. . . . For the same reasons we discussed with regard to Ms. Thompson's sentence, Mr. Stratton's sentence violated his Sixth Amendment rights, and the error was plain.

actual effect of the decision has been that the Guidelines are adhered to more strictly than before, suggests that *Booker*'s remedial opinion should be revisited.

At least as applied in this case Stratton's Sixth Amendment rights were violated by a *de facto* mandatory application of the Guidelines and by an appellate review, which as applied in Stratton's case, resulted in a further constitutional violation because that review and the decision to uphold his sentence as reasonable was based on an unreasonable reliance upon the very same unconstitutional sentencing factors that he complained of in the first place.[4]

The government also argues that Stratton's petition should be held pending the decision in *Kimbrough*. Subject to our arguments above, we agree as to *Kimbrough*. We only note that Stratton's case, because Stratton was held accountable for a down-stream powder-to-crack conversion, and because Stratton was a first offender, presents a more appropriate vehicle to examine the crack-powder disparity issue than does *Kimbrough*. We would ask the Court to consider consolidating Stratton's petition with *Kimbrough*.

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[4] In *Rita*, Justice Scalia favorably noted the decision of the District Court in *United States v. Nadine Griffin*, 393 F.Supp. 2d 1 (D. Mass. 2007). *Nadine Griffin* is further support for Stratton's position, and Stratton requests this Court to consider Judge Young's opinion in support of his petition.

CONCLUSION

Based on the reasoning and citations of authority set forth above and in Mr. Stratton's petition for writ of certiorari, Mr. Stratton requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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